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No. 73-1914

In the
Supreme Court of the United States
OCTOBER TERM, 1973

ADAM J. WESTERMAYER, et al.,
Petitioners,
vs.
THE PULLMAN COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE OF THE PULLMAN COMPANY TO PETITION FOR CERTIORARI

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There are no issues in this case as between petitioners and Pullman which warrant the granting by this Court of the petition for writ of certiorari.

We are not certain what considerations led the Seventh Circuit to conclude, as to Pullman, "that the trial court correctly found that it lacked jurisdiction over the subject matter."

We are certain, however, that there are considerations which wholly justified the affirmance of the dismissal of

the complaint as to Pullman, and which do not conflict with *Glover, et al.* v. *St. Louis-San Francisco Railway Co., et al.*, 393 U.S. 324, and *Czosek* v. *O'Mara*, 397 U.S. 26, relied upon by petitioners.

First, the complaint failed to state a claim upon which relief could be granted as to Pullman, as the Trial Court held. As an examination of the complaint discloses, the essential premise of the complaint is that the unions sent each of their members a circular and strike ballot which sought the approval of the members of a strike in the event that Pullman refused to accept an amendment, to a July, 1966 agreement, providing that all employees of Pullman who were in service on October 17, 1968 would, if furloughed, be entitled to separation pay; that a majority of the union members who voted, voted to strike if Pullman refused to accept the amendment; and that thereafter Pullman and the unions, in violation of the mandate of the strike vote, conspired to enter into an agreement which limited those entitled to separation pay to employees furloughed after January 1, 1969 and which thereby excluded the plaintiffs, all of whom were furloughed between October 17, 1968 and January 1, 1969.

Contrary to the essential premise of the complaint, the circular did not state that the unions would strike if Pullman refused to accept an October 17 effective date. It said, instead, that was the initial demand by the unions on Pullman on September 16. The circular stated further that no agreement had yet been reached with Pullman, that the dispute was being processed through the procedure of the Railway Labor Act, and that:

> "The purpose of this strike ballot, of course, is to seek the honestly expressed views of the employes involved. If the majority of these employes, as re-

quired by the laws of their respective organizations, vote in favor of a strike, *and a prompt and acceptable settlement of this dispute cannot be secured otherwise,* each employe, regardless of how he voted on the strike ballot, will strike when authority to do so is given by the properly constituted authority of the respective organizations. It must be remembered that no strike will occur until it is authorized by the several organizations in strict adherence to their constitutions." (Emphasis added.)

The strike ballot itself, attached to the circular, stated that the members "understand that the question involved is that of authorizing a strike and the fixing of time therefor, in accordance with the laws of the respective organizations, *for the purpose of securing an acceptable settlement of the pending issue* arising out of the organizations' notice of September 16, 1968 requesting that the Agreement of July 9, 1966 be amended to provide for a separation allowance" (emphasis added). Nowhere in either the circular or the strike ballot did the defendant unions seek authorization for a strike in the event Pullman did not agree to an October 17, 1968 effective date.

Plainly, therefore, petitioners could not obtain relief from Pullman on those allegations of the complaint predicated on the faulty premise that a majority of the members of the unions voted to strike in the event Pullman refused to agree to an effective date of October 17, 1968.

The remaining allegations of the complaint are equally without substance.

Certainly, the mere allegation that Pullman did not bargain fairly and nondiscriminately when it did not agree to an October 17, 1968 effective date for the Shopcraft Unions, while agreeing to an effective date prior to October 17, 1968 for severance pay purposes for cer-

tain unions other than the Shopcraft Unions, does not state a claim upon which relief can be granted. Pullman had a right to enter into a severance pay agreement with the Porters and the Clerks providing for one effective date, an agreement with the Conductors providing for a later effective date, and an agreement with the Shopcraft Unions providing for a still later effective date.

It is equally certain that the conclusory allegation that Pullman was prohibited by statute from discriminating among members of the Shopcraft Unions by entering into an agreement which provided separation pay for some but not others does not state a cause of action. Pullman may have had an obligation to treat everyone in the same position equally. That obligation clearly did not prevent Pullman from entering into an agreement on January 16, 1969 providing for an effective date of January 1, 1969, thereby awarding separation pay to all those who were still employed on January 1 but denying it to all those who were furloughed, as the plaintiffs were, before January 1.

Nor do plaintiffs have a cause of action predicated on the allegation that "as a result of the defendants unlawfully and illegally entering into the January 16, 1969, agreement, all of the plaintiffs were wrongfully discharged". The only basis for the assertion that Pullman unlawfully and illegally entered into the agreement of January 16, 1969 is the faulty assumption that the union members voted to strike unless Pullman agreed to an October 17, 1968 cutoff date. No additional facts are alleged to support the conclusion that the plaintiffs were wrongfully discharged.

The second consideration which was wholly dispositive of the case as to Pullman was that the issue whether the

District Court had subject matter jurisdiction of the controversy was *res judicata.*

In early 1971, plaintiffs filed a complaint against Pullman in the Circuit Court of the City of St. Louis, Missouri. A comparison of that complaint with the present complaint reveals only two differences of any significance: In the present complaint, the unions are named as additional defendants, and plaintiffs have added to paragraphs 8 and 10 of the present complaint (parallel to paragraphs 7 and 9 of the Missouri complaint) allegations that they were "wrongfully discharged".

Plaintiffs' first suit was removed to the United States District Court for the Eastern District of Missouri, Eastern Division, as Case No. 71 C 225 (4), where Pullman moved to dismiss on the ground that the Court lacked jurisdiction over the subject matter because plaintiffs had failed to exhaust the administrative remedies provided them by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* On August 17, 1971, Pullman's motion to dismiss was granted, in an opinion reported at 331 F.Supp. 328. Although plaintiffs appealed from that decision, the appeal was dismissed for want of prosecution on October 28, 1971.

Thereafter, plaintiffs filed the present case in the United States District Court for the Eastern District of Missouri, Eastern Division. The case was transferred to the Northern District of Illinois, pursuant to 28 U.S.C. § 1404, by order of the Missouri Court entered on November 14, 1972.

A decision that a Federal Court does not have subject matter jurisdiction of a controversy alleged in a complaint is *res judicata* as to the issue of subject matter jurisdiction in a subsequent suit involving the same par-

ties and the same controversy, 1B *Moore's Federal Practice*, ¶0.405[5], pp. 655, 656, 660; *First Federal Savings and Loan Association* v. *Zequeira*, 305 F.Supp. 37 (D.C. P.R., 1969).

Even if it were held that the decision of the first Missouri Court that it did not have subject matter jurisdiction does not bar, by *res judicata*, the added claim in this case that the plaintiffs were "wrongfully discharged" (which allegation, as we have said, alone in substance distinguishes the allegations of the present complaint from the allegations of the first Missouri complaint), the Trial Court nevertheless did not have subject matter jurisdiction of the additional claim.

In suits asserting a claim for "wrongful discharge", employees are required to exhaust the administrative remedies of the Railway Labor Act, 45 U.S.C. § 153 First (i), see *Andrews* v. *Louisville and Nashville Railroad Co., et al.*, 406 U.S. 320 (1972).

We submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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